

**TESTIMONY OF PRINCIPAL CHIEF MICHELL HICKS
THE EASTERN BAND OF CHEROKEE INDIANS**

**H.R. 898, Legislation that Would Congressionally Acknowledge the Lumbees as
an Indian Tribe**

April 1, 2004

Chairman Pombo, Ranking Member Rahall, members of the House Resources Committee, I am honored to be here to testify today before this Committee to provide the views of the Eastern Band of Cherokee Indians. Mr. Chairman, I want to thank you for your leadership in the area of Indian affairs. Your advocacy for Indian people is well known in Indian Country and we appreciate the priority you have made of addressing our needs.

The Eastern Band of Cherokee Indians, the Cherokee people, and tribes across the United States feel strongly that Congress should not enact this legislation. There are several reasons for this:

First, the integrity of the Eastern Band and other tribes with living tribal languages and long standing government-to-government relations with the United States is undermined where politics and emotion, rather than facts about tribal identity, dictate outcomes regarding federal recognition. Consistent with the views of Eastern Cherokee leaders since at least 1910, there are very serious questions about the tribal identity of the Lumbees.

Second, the Department of the Interior's Office of Federal Acknowledgement (OFA), while imperfect, is the only federal entity equipped to make an informed, merits-based determination of Lumbee tribal identity and recognition. Congress is not equipped to make these decisions.

Third, Congress should be absolutely certain that the Lumbee group meets the objective criteria at Interior before it enacts a bill that could cost more than \$682 million dollars of taxpayer dollars over four years and further decrease the funds existing tribes and Indians receive. Congress cannot be confident in the merits of this bill. In fact, the Lumbee group would have a difficult time meeting the established federal acknowledgement criteria in a non-political setting.

For these reasons, which I will explain in more detail, the Eastern Band strongly opposes this bill.

**This Legislation Impacts the Integrity of
Eastern Band and other Established Tribes**

Since before the coming of Europeans to this continent, the Cherokee have lived in the southeastern part of what is now the United States, in the states of North

Carolina, South Carolina, Alabama, Georgia, Kentucky, Tennessee, and Virginia. Through these years, the Cherokee have faced unending threats to our very existence – including the tragic Trail of Tears where more than 15,000 Cherokee Indians were forcibly removed by the U.S. Army from their ancestral homelands to the Indian Territory as part of the federal government’s American Indian Removal Policy. Thousands died. The Cherokee came to call the event Nunahi-Duna-Dlo-Hilu-I or Trail Where They Cried. The Eastern Band of Cherokee Indians are the descendants of those Cherokees that resisted removal in the Great Smoky Mountains and escaped the Trail of Tears or who were able to return to their homeland in the Smoky Mountains after the Trail of Tears.

Yet, through all of this, the Cherokee people have fiercely protected our separate identity as Cherokees. Many of our tribal members are fluent in the Cherokee language. We have a separate culture that makes us different than any group of people in the world. Leadership of the Cherokee and the Cherokee people themselves, with tenacity and determination, have fought to ensure that our way of life, our beliefs, and our sovereignty will survive. And we are still here today – proud and strong.

Like other tribes across the country, we hold in high regard the long standing government-to-government relationship the Eastern Band of Cherokee Indians has with the United States. We are proud that the United States has entered into treaties with the Cherokee that helped shape the government-to-government relations with all tribes.

But today, like other tribes, we face a new threat to our separate identity: groups of people who claim, or who have claimed Cherokee, or other tribal affiliations whose legitimacy is doubtful at best. Unfortunately, we believe this to be the case with this bill.

Serious Problems with Claimed Lumbee Tribal Identity

If Congress recognizes groups whose tribal and individual identity as Indians is seriously in doubt, it will dilute the government-to-government relationships that existing federally recognized tribes have with the United States. We strongly believe that this bill would undermine the integrity of existing federally recognized Indian tribes due to the real problems that the Lumbee have in demonstrating that it is a tribe, including their inability to trace the genealogy of its 54,000 members to a historic tribe.

The Lumbee Have Self-Identified As Four Different Tribes

The Lumbee group seeking Congress’s acknowledgment today has been before the Congress on numerous occasions in the past, including 1899, 1910, 1911, 1913, 1924, 1932, 1933, 1955, 1988, 1989, 1991, 1993, and now 2004. The tribal identity of the Lumbees, who have over the course of history self-identified themselves as four different tribes before Congress –Croatan, Cherokee, Siouan, and now Cheraw – is highly in question. These appellations do not correlate with each other. Linguistically, the Croatan were Algonquian, the Cherokee Iroquoian, and the Cheraw were Siouan. Thus, these disparate references themselves implausibly covered three distinct and

separate linguistic groups. Moreover, referring to themselves as the “Siouan Tribe” did not make sense because the term “Siouan” is simply a reference to a broad generic linguistic classification that encompassed many distinct tribal languages in North America, including Osage, Assiniboine, Dakota, Lakota, Catawba, Hidatsa, Crow, Mandan, Ponca, Biloxi, and Quapaw, to name a few.

The origin of the Lumbee name comes not from a historic tribe but from a geographic location in the State of North Carolina, a place along the Lumber River. The term “Lumbee” is a modern creation that the group selected as its name in 1952. Over the years, the Congress has heard from this same group many times seeking federal acknowledgement. The Lumbee have self-identified themselves as any number of vastly different linguistic groups in these efforts.

Lumbee’s Self-Identification as “Croatan” Indians

For example, as the Lumbee’s own hired expert Dr. Jack Campisi stated in his testimony before the Senate Indian Affairs Committee on September 17, 2003, the Lumbee sought federal services from the Congress as Croatan Indians in the 1880’s and early 1900’s.¹

In 1993, this Committee’s House Report contained the following relating to the history of the Lumbee group, including its “Croatan” origins:

The story of how the progenitors of the Lumbee came to live in this area of North Carolina is a multifarious one. In fact, there are almost as many theories as there are theorists. Up until the 1920’s, the most persistent tradition among the Indians in Robeson County was that they were descended primarily from an Iroquoian group called the Croatans. This theory, though highly conjectural, is as follows. In 1585, Sir Walter Raleigh established an English colony under Gov. John White on Roanoke Island in what later became North Carolina. In August of that year, White departed for England for supplies, but was prevented from returning to Roanoke for 2 years by a variety of circumstances. When he finally arrived at the colony, however, he found the settlement deserted; no physical trace of the colonists was found.

The only clue to their whereabouts were the letters “C.R.O.” and the word “Croatoan” carved in a tree. From this it was surmised that the colonists fled Roanoke for some reason, and removed to the nearby island of Croatoan which was inhabited by a friendly Indian tribe. There, according to the theory, they intermarried with the Indians, and the tribe eventually migrated to the southwest to the area of present-day Robeson County. The theory is lent some credence by reports of early 18th century settlers

¹ “Testimony of Dr. Jack Campisi, in Support of S. 420, United States Senate Committee on Indian Affairs” (September 17, 2003) p. 6.

in the area of the Lumber River who noted finding a large group of Indians – some with marked Caucasian features such as grey-blue eyes – speaking English, tilling the soil, “and practicing the arts of civilized life.” In addition, many of the surnames of Indians resident in the county match those of Roanoke colonists.²

Lumbee’s Self-Identification as “Cherokee” Indians

In the state of North Carolina, the Lumbee group sought recognition from the North Carolina legislature in 1913 as the “Cherokee Indians of Robeson County.” This legislation was passed, despite the Eastern Band’s opposition, and the group was recognized in North Carolina as “Cherokee” Indians. That continued for 40 years until 1953 when the North Carolina legislature, at the Lumbee group’s request, passed legislation recognizing them as the “Lumbee” Indians instead of as the “Cherokee” Indians.

As the Lumbee’s expert Dr. Campisi stated, after World War I, this Lumbee group sought legislation in Congress for recognition as “the Cherokee Indians of Robeson and adjoining counties.” Specifically, in 1924, Dr. Campisi noted that the now-called Lumbee group had legislation introduced in the U.S. Senate that would have recognized them as “Cherokee” Indians. However, the Commissioner of Indian Affairs Charles H. Burke opposed the legislation and it failed to pass. Dr. Campisi went on to state that the Lumbee group renewed their efforts in 1932 and had a bill introduced in the Senate that would have recognized them as “the Cherokee Indians,” but this effort failed also.³ The Eastern Band has, since the early 1900’s when the Lumbee group sought formal recognition as Cherokee, consistently and strongly opposed these efforts of the Lumbees to be recognized as a tribe.

Lumbee’s Self-Identification as “Siouan” Indians

According to the Lumbee, they sought federal recognition as “Siouan” Indians in 1924. Further, in the 1930’s, for purposes of the Indian Reorganization Act, the Lumbees self-designated themselves as the “Siouan Indian Community of Lumber River.”⁴ As stated above, the term “Siouan” is a reference to a generic linguistic classification that is spoken by many tribes in North America and is not a term that describes a distinct historical tribe.

² H.R. Rep. No. 103-290, 103rd Cong., 1st Sess. at 179 (1993).

³ *Id.* Ms. Arlinda Locklear, in her testimony before the Senate Indian Affairs Committee last year, noted that the Lumbee group claimed that they were Cherokee and sought federal legislation to be recognized as Cherokees. “Testimony of Arlinda Locklear, Patton Boggs LLP, Of Counsel for the Lumbee Tribe of North Carolina in Support of S. 420 United States Senate Committee on Indian Affairs” (September 17, 2003) p. 4.

⁴ *Id.* at 9.

It was not until 1952 that the Lumbees decided to refer to themselves as “Lumbee” based upon their geographic location next to the Lumber River. In 1956, Congress, at the request of the Lumbees, passed legislation commemorating their name change.⁵

The Lumbees’ Current Efforts to Link Themselves to the Cheraw Tribe Are Tenuous

The federal acknowledgment criteria require that the membership of a petitioning group consist of “individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.”⁶ The regulations define “historical” in this context as “dating from first sustained contact with non-Indians.”⁷ The origin and ties to a historical tribe have been the subject of uncertainty not only among experts in the area but also the Lumbee themselves.

Congress in the 1956 Lumbee Act went far to avoid a historical tribal designation of the “Lumbee” Indians, reiterating the “claim” of the Lumbee to unnamed tribes. The 1956 Lumbee Act states, “The Indians now residing in Robeson and adjoining counties of North Carolina . . . and claiming joint descent from remnants from early American colonists and certain tribes of Indians originally inhabiting the coastal region of North Carolina, shall, from and after the ratification of this Act, be known and designated as Lumbee Indians of North Carolina” 70 Stat. 254, 255 (June 7, 1956).

The Lumbee have often repeated the mantra that the Lumbee Act “recognized” them as a tribe on one hand and “terminated” them on the other. The language of the statute itself, court interpretation,⁸ and the American Law Division of the Library of Congress belie this claim.⁹ The Lumbee Act only recognizes individual Indians, not a tribe. Congress certainly knew how to expressly recognize an Indian tribe and avoided doing so here.¹⁰ Also, in 1956, Congress terminated four tribes: the Lower Lake

⁵ *Id.* at 9-10.

⁶ 25 C.F.R. § 83.7(e).

⁷ *Id.* at 83.1.

⁸ In *Maynor v. Morton*, the United States Court of Appeals for the District of Columbia stated that, “the limited purpose of the legislation appears to be to designate this group of Indians as “Lumbee Indians.” The court also noted that the Act was “a simple statute granting the name ‘Lumbee Indian’ to a group of Indians, which hitherto had not had such designation legally.” *Maynor v. Morton*, 510 F.2d 1255 (D.C. Cir. 1975).

⁹ In a 1988 opinion, the Library of Congress concluded “that the 1956 statute does not provide recognition of the Lumbee Indians as a political entity.”

¹⁰ The Lumbee also argue that they are similarly situated to the Ysleta de Sur Pueblo, also known as the Tiwa Tribe, a tribe whose government-to-government relationship was terminated by Congress, then later restored. The Lumbee group, by contrast, has never had a government-to-government relationship with the United States. The language of the Tiwa Act, furthermore, specifically refers to the Tiwa as a tribe. The Act of Dec. 12, 1968, 82 Stat. 93.

Rancheria, Wiandotte, Peoria, and Ottawa. So, Congress knew also how to expressly terminate tribes at the time.

Experts at the Bureau of Indian Affairs have testified that the Lumbee ties to the Cheraw Tribe are tenuous. On August 1, 1991, Director of the Office of Tribal Services Ronal Eden testified on behalf of the Administration regarding federal legislation that would Congressionally acknowledge the Lumbee. Regarding the Lumbee petition for federal recognition before the agency, the Director testified to a “major deficiency” that “the Lumbee have not documented their descent from a historic tribe.”¹¹

The testimony also stated that the 18th century documents used by Lumbee to support its claim that it is primarily descended from a community of Cheraws living on Drowning Creek in North Carolina in the 1730’s needed extensive analysis corroborated by other documentation.¹²

In his September 17, 2003 testimony before the Senate Indian Affairs Committee, Lumbee expert Jack Campisi relies on a report of Dr. John R. Swanton of the Bureau of Ethnology for concluding “in the 1930s that the Lumbees are descended predominantly Cheraw Indians.”¹³ The House Report specifically refutes this claim, stating that Swanton chose “Cheraw” rather than another tribal name he identified – “Keyauwee” – because the Keyauwee name was not well known. “In other words, the choice of the Cheraw was apparently made for reasons of academic ease rather than historical reality.”

Furthermore, the head of the BIA’s acknowledgment process questioned the adequacy of the underlying proof of Cheraw descent. He testified in 1989 that:

The Lumbee petition . . . claims to link the group to the Cheraw Indians. The documents presented in the petition do not support [this] theory These documents have been misinterpreted in the Lumbee petition. Their real meanings have more to do with the colonial history of North and South Carolina than with the existence of any specific tribal group in the area in which the modern Lumbee live.

Counsel to the Lumbee Arlinda Locklear in her testimony before the Senate Indian Affairs Committee admits that these concerns continue today. “Department staff that administers the administrative acknowledgment process have expressed some

¹¹ Statement of Ronal Eden, Director, Office of Tribal Services, Bureau of Indian Affairs, Department of the Interior, Before the Joint Hearing of the Select Committee on Indian Affairs, United States Senate, and the Interior and Insular Affairs Committee, United States House of Representatives, On S. 1036 and H.R. 1426 (August 1, 1991) p. 3-5.

¹² *Id.*

¹³ Campisi Testimony at 21.

concern about the absence of a genealogical connection between the modern day Lumbee Tribe and the historic Cheraw Tribe.”¹⁴

Claimed Lumbee Membership Not Tied to Cheraw Individuals

The various documents on which the Lumbee membership list is based similarly cast doubt as to the ability of the Lumbee to meet the acknowledgement criteria. The Lumbee claim 54,000 enrolled members who are descended from anyone identifying as “Indian” in five North Carolina counties and two South Carolina counties in either the 1900 or 1910 federal census. The Lumbee Constitution refers to these census lists as the “Source Documents.” Yet the individuals on these lists cannot be specifically identified and verified as Cheraw Indians. In fact, these individuals cannot be identified as belonging to any tribe whatsoever. These are lists of people who self-identified or were identified by the census as “Indian”.

Mr. Chairman, members of this Committee have recognized the weaknesses and complexities in the Lumbee group’s claim to tribal recognition in the past:

The Lumbee . . . have never had treaty relations with the United States, a reservation, or a claim before the Indian Claims Commission; they do not speak an Indian language; they have had no formal political organization until recently; and they possess no autochthonous “Indian” customs or cultural appurtenance such as dances, songs, or tribal religion. One of the groups consultant anthropologists, Dr. Jack Campisi, noted this lack of Indian cultural appurtenances in a hearing colloquy with then-Congressman Ben Nighthorse Campbell:

Mr. Campbell: Do [the Lumbee] have a spoken language . . . ?

Dr. Campisi: No.

Mr. Campbell: Do they have distinct cultural characteristics such as songs, dances and religious beliefs and so on? . . . Do the Lumbees have that?

Dr. Campisi: No. Those things were gone before the end of the 18th Century.

This absence of cultural appurtenances in part identify the Lumbee as part of what sociologist Brewton Berry has termed the “marginal Indian groups.” As Berry notes:

These are communities that hold no reservation land, speak no Indian language, and observe no distinctive Indian customs. Although it is difficult to establish a firm historical Indian ancestry for them, their members often display physical features that are

¹⁴ “Testimony of Arlinda Locklear, Patton Boggs LLP, Of Counsel for the Lumbee Tribe of North Carolina in Support of S. 420 United States Senate Committee on Indian Affairs” (September 17, 2003) p. 4 fn. 1.

decidedly Indian. Because they bear no other historic tribal names, they often emphasize a *Cherokee* ancestry.

These characteristics . . . point out that this is a case replete with out-of-the-ordinary complexities which require more than just a simple one-page staff memo to understand fully. Needless to say, if those [Members of Congress] charged with the day-to-day oversight of Indian affairs do not have the necessary expertise – or even knowledge – in this area, how will the balance of our Members appropriately exercise those judgments as they will be called upon to do when this legislation reaches the floor?¹⁵

Interior's Office of Federal Acknowledgement Is the Proper Forum for Deciding Whether the Lumbee Should be Federally Recognized

The Department of the Interior through the Office of Federal Acknowledgement (OFA) has an established uniform administrative process with objective criteria that can make exactly the kind of substantive, merits-based determinations that the Congress is unequipped to make. While the OFA is not perfect and needs additional funds to do the job it is supposed to do, it should not be abandoned, but fixed. To allow the Lumbees to circumvent that process would be to abandon the merits, which again we believe the Lumbees have significant problems with, in favor of old-fashioned politics.

Mr. Chairman, members of the Resources Committee have noted the harm that would come to long-standing federally recognized tribes from legislation like this:

Bypassing the [administrative] process not only ignores the problem [with that process], but is unfair to all of the recognized tribes. There exists a formal government-to-government relationship between the recognized tribes and the United States. If Congress creates tribes at will, without meaningful uniform criteria or substantial corroborated evidence that the group is indeed a tribe, then we dilute and weaken that relationship.¹⁶

Members of this Committee have acknowledge that a large number of tribes and tribal organizations supported strict adherence to a systematic administrative procedure, including:

[T]ribes in twelve states, from regional intertribal organizations representing all the tribes of the Pacific Northwest, Montana and Wyoming, the United South and Eastern Tribes (representing all the tribes

¹⁵ H.R. Rep. No. 103-290, 103rd Cong., 1st Sess. at 186-87 (1993).

¹⁶ *Id.* at 202.

from Maine to Florida and west to Louisiana), all of the ten southwestern Pueblo tribes, and twenty-five of the twenty-six tribes in Arizona.¹⁷

Moreover, while the Lumbee have argued that the process is unfair, their bill, contrary to their argument, provides that the other North Carolina groups, who the Solicitor's office at Interior has also determined are barred from accessing OFA under the 1956 Lumbee Act, would be authorized to submit petitions to OFA for federal acknowledgment. If it is fair for these other groups to go through the OFA process, then it should be fair for Lumbee also.

When this same basic legislation came up 11 years ago, members of this Committee argued strongly that the Lumbee should be required to follow the administrative process:

[T]he argument that the Lumbee should be allowed to bypass the process because it is too cumbersome and backlogged is ... specious. While the BIA recognition process is in need of repair, it is not as decrepit as the majority would have us believe. There is only a backlog of nine petitions, not the 120 cases often cited; and while we concede that the process is imperfect, the most rational solution is to fix it. Bypassing the process only ignores the problem, undermines the role of the BIA, and is unfair to both recognized and unrecognized tribes.¹⁸

Harm to Existing Tribes and Waste of Taxpayer Money

The impact on appropriations to other Indian tribes would be unprecedented in the history of federal acknowledgment. The Congressional Budget Office has determined that, based on an estimate of 34,000 Lumbees, that the cost of this legislation would be \$430 million over four years. Yet the Lumbees claim approximately 54,000 members. Based upon the Congressional Budget Office's estimate and the 54,000 members claimed by Lumbee, the real cost of this bill would be over \$682 million dollars. Furthermore, the Bureau of Indian Affairs announced only a few days ago that the budget for Indian programs would take another cut of 2.7% (\$70 million).

Accordingly, this bill would have a huge, negative impact on the budgets of Bureau of Indian Affairs and the Indian Health Service and would decrease even further the badly needed funds Indian people receive as a result of promises and trust obligations of the United States to Indians and tribes. This Committee and the Congress should not dive into support for this legislation for emotional or political reasons, particularly without being absolutely certain that this group constitutes an Indian tribe in accordance with the objective criteria at the Office of Federal Acknowledgement.

¹⁷ *Id.* at 202-03.

¹⁸ *Id.* at 206.

CONCLUSION

If this Committee and the Congress chose to pass this legislation, the consequences will be dramatic for existing federally recognized tribes.

First and foremost, politics will have won a decided victory over sound policy. The notion of “taking the politics out of federal recognition” will have suffered its most severe setback in history.

Second, with federal acknowledgement comes the ability of a group to engage in serious activities associated with sovereign status, such as the ability to tax and enjoy certain tax advantages, the ability to exercise civil jurisdiction over non-Indians as well as Indians, and the right to engage in gaming. Enacting legislation like this only arms those who seek to erode sovereign rights with evidence that some of those with such rights were haphazardly afforded them.

Chairman Pombo, Ranking Member Rahall, and other distinguished members of the Committee, the Eastern Band of Cherokee Indians would welcome the Lumbees into the family of federally recognized tribes if they can successfully make it through the administrative process at the Department of the Interior. Absent their meeting the objective criteria at Interior, with complete vetting of their claimed tribal identity, membership lists, and other requirements, we believe that passing this legislation would be a serious mistake, with politics winning out over sound policy.

In 1993, Mr. Chairman, members of this Committee said:

This Committee must decide if it will continue to support the utilization of an equitable and standardized method of determining which Indian groups should be recognized by the federal government, or if it will return us to the pre-1978 days of piecemeal and arbitrary recognition through individual bills such as [the Lumbee recognition bill under consideration in 1993.] . . . [Such an arbitrary approach] can only serve to undermine further an already beleaguered recognition process, to encourage other groups to circumvent that process, and to place recognition in an arena where emotional arguments, influential sponsors, and the partisan nature of Congress replace merit and fact. For these reasons we strongly oppose passage of [the Lumbee recognition bill].¹⁹

For those same reasons, we strongly oppose the passage of H.R. 898. If you determine that any legislation is needed, we urge you to consider H.R. 1408, which would give the Lumbee a fair opportunity to meet the equitable and standardized requirements established in the administrative process.

¹⁹ *Id.* at 207.